INDEX TO PETITION.

	Page
Motion for writ of certiorari	1
Petition for a writ of certiorari	3
Statement of the case	3
Reasons relied upon for issuance of writ of certiorari	11
Prayer for writ	18
Certificate of counsel	19

TABLE OF CASES CITED.

Acme Harvester Co. v. Beekman Lbr. Co., 222 U. S., 300; 32 S. Ct., 96	16
First National Bank of Jacksboro v. Lasatar, 196 U. S., 115; 25 S. Ct., 206; 49 L. Ed., 409	12
Johnson v. Collier, 222 U. S., 538; 32 Sup. Ct., 104	15

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1060.

M. O. DANCIGER AND EMERICH OIL COMPANY,
A CORPORATION, PETITIONERS,

vs.

N. K. SMITH, RESPONDENT.

MOTION FOR WRIT OF CERTIORARI.

Come now M. O. Danciger and Emerich Oil Company, petitioners, by their undersigned counsel, and move this Honorable Court that it shall, by certiorari directed to the judges of the Court of Civil Appeals of the Fifth Supreme Judicial District of the State of Texas, at Dallas, Tex., require said court to certify to this Court, for its review and determination, a certain cause in said court of appeals, lately pending, wherein the petitioners, M. O. Danciger and Emerich Oil Company, were plaintiffs in error and N. K. Smith was de-

fendant in error, and to that end they now tender herewith their petition and brief, with a certified copy of the entire record in said cause in said court of civil appeals, lately pending, wherein the petitioners, M. O. Danciger and Emerich Oil Company, were plaintiffs in error and N. K. Smith was defendant in error, and to that end they now tender herewith their petition and brief, with a certified copy of the entire record in said cause in said court of civil appeals and the Supreme Court of Texas.

M. O. DANCIGER,
EMERICH OIL COMPANY,
By I. J. RINGOLSKY,
WALLACE & TAYLOR,
CARDEN, STARLING, CARDEN & HEMPHILL,
CHARLES L. BLACK,
T. F. HUNTER,
RINGOLSKY, FRIEDMAN & BOATRIGHT,

Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1060.

M. O. DANCIGER AND EMERICH OIL COMPANY,
PETITIONERS,

vs.

N. K. SMITH, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, M. O. Danciger and Emerich Oil Company, a corporation, respectfully represent in support of their petition for writ of certiorari to be directed to the Court of Civil Appeals of the Fifth Supreme Judicial District of Texas at Dallas, Texas, as follows:

On June 22, 1920, respondent filed suit in the District Court of Dallas County, Texas, against peti-

tioners, and Oriental Oil Company, a corporation, seeking to recover a broker's commission claimed to be due him on account of certain negotiations carried on in the month of May, 1920, for the sale of certain oil properties then belonging to petitioners to Oriental Oil Company, but which sale between said parties was not consummated. A joint and several judgment was rendered against petitioners on June 2, 1924, for $60,000.

The case was duly appealed to the Court of Civil Appeals of Texas having jurisdiction and, on May 15, 1926, a judgment and opinion was rendered by that court affirming the judgment. Application for writ of error was then made to the Supreme Court of Texas, which court has jurisdiction in its discretion to review the judgments and opinions of the Court of Civil Appeals. On December 1, 1926, the Supreme Court, in an opinion delivered by its Chief Justice, denied the application for a writ of error and, on January 19, 1927, overruled petitioners' motion for a rehearing (R., 446) and petitioners have, therefore, exhausted their remedies in the highest courts of the State of Texas in which a decision could be had.

One of the defenses specially pleaded in petitioners' answer and presented to and considered by both the Court of Civil Appeals and the Supreme Court, and which defense constitutes the basis for this application for certiorari, is founded on the following facts, viz. (see R., pages 163 to 168, inclusive, for testimony of respondent N. K. Smith as to bankruptcy matters):

After this suit was filed (June 22, 1920) and before trial, respondent filed a voluntary petition in bank-

ruptcy in the District Court of the United States at Dallas on June 17, 1921. Respondent in said bankruptcy proceeding filed schedules of assets and liabilities in the form prescribed by this Court. He did not list in his schedule of assets this claim against petitioners and, in said schedules, stated on his oath that he had *no property of any kind or nature.* He further stated on his oath in said schedules that he had no personal property and *no choses in action.* In his schedule of liabilities he listed $198,608.87 as unsecured debts and $25,113.03 as his liability on accomodation paper and *$1,125 as secured debts.* In said schedules, in answer to the question what portion of his property had been assigned for the benefit of creditors, he stated on his oath that none had been so assigned. On account of there being no assets of any kind scheduled, no trustee was appointed. Thereafter respondent filed in said bankruptcy proceedings his petition for discharge and, on his oath, stated that he had duly surrendered all his property and rights of property and complied with all the requirements of the Bankruptcy Act and, pursuant to such petition, was, on September 23, 1921, discharged in bankruptcy.

When the foregoing facts were pleaded by petitioners in bar of respondent's suit, respondent thereupon filed an amended petition seeking to excuse the situation by alleging for the first time certain absolute assignments of the claim in suit as follows:

> To his attorneys, one-third interest.
> To Dr. J. B. Cranfill, one-third interest.
> To Mrs. A. E. Hutchinson, one-third interest.

Respondent introduced in evidence carbon copies of two purported letters, one addressed to Dr. J. B. Cranfill, dated August 14, 1920, and the other addressed to Mrs. A. E. Hutchinson (respondent's mother-in-law), dated August 15, 1920. The letter to Hutchinson is as follows (pages 325-326, inclusive):

> "Referring to our several conversations this is to confirm our agreement arrived at relative to settlement with you covering the amounts of money advanced me, which apparently seems to have been lost in my oil ventures.
>
> "As explained to you, I have invented a new kind of wrench which I am endeavoring to get patented and I also have some claims for commissions against M. O. Danciger and Emerich Oil Company and others of Wichita Falls and also one against Y. O. McAdams of Dallas. Suit has been brought in both of these matters and, as previously explained, same have been brought in my name.
>
> "Now in consideration of what I am due you covering amounts of money advanced to me, I hereby transfer to you a *two-thirds interest in all of these matters* and agree to push to completion the patent referred to and to prosecute the two claims through the courts in my name and under this agreement to turn over to you any results received therefrom as agreed."

The letter to Cranfill is of the same tenor except that it purports to assign a *one-third* interest in the same matters.

Neither Cranfill or Hutchinson appeared in any way either as parties or witnesses in the trial of the

case. Neither were these assignments filed or recorded as required by the Texas Statute. Respondent alone testified concerning these assignments and testified that the assignments were made for security only and not as absolute assignments. He testified as follows:

> "When I get through with this thing if the jury does not give me anything, I will still owe Dr. Cranfill the same amount of money and I will still owe my mother-in-law the same amount of money and if I live I will pay them * * * (R., 168).
>
> "These purported assignments of the alleged date of August 14, 1920, addressed to Dr. J. B. Cranfill was but the security for the indebtedness that I owed Dr. Cranfill; that was our intention—just a security for the debt I still owe him. This paper did not reduce the indebtedness but merely secured him as far as I could. The same is true with respect to Mrs. Hutchinson" (R., 166).

Respondent testified he had assigned a one-third interest to his attorneys, as pleaded in his amended petition, but no assignment whatever was produced to his attorneys, and no evidence or testimony of any reassignment from Cranfill of his one-third interest or Hutchinson of her two-thirds interest to anyone was produced or testified to by anyone.

It appears conclusively that respondent was not trying to recover merely for the benefit of his two assignees and this was not an action by the assignees in the name of the assignor, and both the Court of Civil Appeals and the Supreme Court decided the case on

the assumption and theory that respondent still had an equity in the claims. Moreover, it does not appear what the patented wrench or his claim against Y. O. McAdams were worth, neither of which were scheduled and both of which are also assigned in the letters to Cranfill and Hutchinson. He testified his indebtedness to Hutchinson was $25,000, two-thirds of this $60,000 claim and judgment is $40,000, which leaves an equity of $15,000 for respondent on this assignment alone, to say nothing of the patented wrench and claim against Y. O. McAdams, the values of which are not disclosed. Respondent's indebtedness to Cranfill is not clear from the record, but seems to be about $35,000.

This defense of bankruptcy specially set up and pleaded was denied by the trial court, the Court of Civil Appeals and the Supreme Court of Texas.

Referring to this defense the Court of Civil Appeals, in its opinion, says in part:

> "In considering this matter, we do not find it necessary to determine the question as to whether there remained in appellee an equitable interest in the claim after he made the assignments hereinbefore mentioned for, *even admitting that such an interest did remain,* still his being adjudicated a bankrupt could not affect the *validity of the assignments nor the right of the assignees to have the suit prosecuted in his name.*
>
> "The suit did not abate by reason of the bankruptcy proceedings nor could a trustee, if one had been appointed, have intervened except with

the approval and on the order of the bankruptcy court. Subdivision C of Section 11 Bankrupt Act makes provision for such a situation as follows: 'a trustee may, with the approval of the court, be permitted to prosecute, as trustee, any suit commenced by the bankrupt prior to the adjudication with like force and effect as though it had been commenced by him.'

"It follows, therefore, that, if the suit had been prosecuted by appellee in his own right, *as no trustee was appointed,* presumably for good and sufficient reasons appearing to the court, appellants would not thereby have been discharged.

"In *no event,* under our view of the law, *would failure* of appellee *to schedule* the claim in the bankruptcy proceedings, discharge the liability of appellants or *constitute a bar to this action.* If there remained in appellee any equitable interest in the claim, *it passed constructively into the custody of the bankruptcy court* when he was adjudicated a bankrupt, to be administered for the benefit of his creditors. That court, for reasons which we have no right to scrutinize, *failed to appoint a trustee,* and later closed the estate and discharged appellee." (Italics ours.) (R., 362-363.)

Concerning this matter the Supreme Court, in its opinion, says in part:

"It appears that the defendant in error was adjudicated a bankrupt, but, since he listed no assets, *no trustee in bankruptcy was ever appointed* and, of course, no claim was made by a trustee to the assets evidenced by the claim re-

covered on in this proceeding * * * (R., 447-448).

"Plainly stated the insistence is that when the defendant in error filed his petition in bankruptcy and was adjudicated a bankrupt, all title to the choses in action upon which this suit is brought passed out of him and that, in so far as the present litigation is concerned, he was civilly dead * * * (R., 448).

"Whatever may have been the previous holdings of authoritative courts, it is certain now that the bankrupt is no longer considered as civilly dead during the time elapsing during the period of the adjudication in bankruptcy and the appointment of a trustee. On the contrary, the courts now hold that the *title to the property remains in the bankrupt and subject to his control until a trustee is appointed and has qualified.* He may, during that period, maintain such actions or proceedings as may be necessary to preserve and protect the property and his rights in this respect are *only divested by the appointment of a trustee* * * * (R., 448).

"Upon these authorities it is plain enough that the opinion of the Court of Civil Appeals holding that the *defendant in error in this suit could maintain the action is correct.* Nor is the opinion in conflict with that of Perkins *v.* Alexander, 209 S. W. 789 (Texas). The Court of Civil Appeals in that case held that, where the plaintiff *failed to schedule a note* in his bankruptcy proceedings and inferentially *concealed from the trustee* he could not, after having been adjudicated a bankrupt, *maintain suit on the note and foreclose a mortgage securing it with-*

out showing that the trustee had not elected to claim the note or refused to do so. In that case a trustee in bankruptcy had been appointed and *this is a material and distinguishing difference between it and the case at bar.*" (Italics ours.) (R., 452.)

The writ should be issued because—

(*a*) These decisions deny a right and immunity specially set up and claimed by petitioners under the Bankruptcy Act of the United States.

(*b*) These decisions involve and deny rights claimed by petitioners by reason of the judgment and proceedings of a Federal court, which is an authority exercised under the United States.

(*c*) These decisions are in direct conflict with the applicable decisions of this Court.

(*d*) The precise question has not been decided by this Court.

It will be observed that both the Court of Civil Appeals and the Supreme Court finally rest their decisions on the theory that, as no trustee was appointed, therefore, title did not pass out of respondent, the bankrupt, and, therefore, he had a right to maintain the suit, but both opinions concede that, if a trustee had been appointed and the same facts otherwise prevailed, respondent could not maintain the action.

Petitioners' contention is that respondent, as a bankrupt, cannot go into a court of bankruptcy and represent on his oath to that court that he owns no property

or choses in action whatever, including this claim, and has not assigned or transferred any property as security to any creditor and thus contribute to, if not entirely cause, a trustee not to be appointed and then, after such concealment and false oaths, and after his discharge, be deemed to be in a better position with respect to maintaining an action and recovering assets, either for himself or his favored creditors, which really belong to his estate and all his creditors than a bankrupt who merely conceals the existence of assets from his trustee. The effect of the distinction made by the Texas court is to put a premium on the actions of the bankrupt who not only conceals assets and makes false oaths, but prevents the appointment of a trustee.

Petitioners contend that the rule laid down by this Court in First National Bank of Jacksboro *v.* Lasatar, 196 U. S. 115, 25 S. Ct. 206, 49 L. Ed. 409, to the effect that a bankrupt who concealed assets from his trustee could not afterwards maintain an action to recover same, is based on no such narrow or technical ground as is the basis of the distinction made by the Texas courts. The facts in that case were that Lasatar borrowed money from the First National Bank of Jacksboro, Texas, and was charged usury. After this transaction he became a voluntary bankrupt and returned no assets to his trustee in bankruptcy. After his discharge in bankruptcy, he brought suit against the bank to recover twice the amount of usury as is provided under the Federal statutes. The bank pleaded the proceedings in bankruptcy as a bar to the action. The

Court of Civil Appeals of Texas denied the defense and this Court reversed the Texas court, saying in part as follows:

> "The question then presented is whether this right of action, having once passed to the trustee in bankruptcy, was re-transferred to J. L. Lasatar upon the termination of the bankruptcy proceedings, he having returned no assets to his trustee and having failed to notify him or his creditors of this claim for usury and beginning this action within less than two months after the final discharge of the trustee. We have held that trustees in bankruptcy are not bound to accept property of an onerous or unprofitable character and that they have a reasonable time in which to elect whether they will accept or not. If they decline to take the property, the bankrupt can assert title thereto. (Citing authorities.)
>
> "But that doctrine can have no application where the trustee is ignorant of the existence of the property and has had no opportunity to make an election. *It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee knowledge of certain property can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it.* If the claim was of value (as certainly this claim was, according to the judgment below), it was something to which the creditors were entitled and *this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property.*" (Italics ours.)

Under the authority of the above case, the Texas courts concede that, if a trustee had been appointed in respondent's bankruptcy proceedings, that then the defense pleaded would be good and that respondent could not have maintained the action. We think this Court's opinion does not rest merely upon the narrow ground that a trustee having been appointed, the title vested in the trustee. It is perhaps easier to see why the bankrupt cannot be permitted to maintain an action with regard to assets which he did not return to his trustee, where one was appointed, but it is no less the law that he cannot be permitted to maintain an action with respect to assets which he should have returned and which failure to return assets contributed to the failure to appoint a trustee. As we understand this Court's opinion, it rests upon a broader ground, viz, that of estoppel and that a bankrupt, by representing the facts to be a certain way in the bankruptcy court cannot, after having invoked the jurisdiction of the bankrupcy court and obtained its orders and judgments based upon such representation, be permitted to repudiate and, in effect, attack the judgment and proceedings of the bankruptcy court by asserting a contrary state of facts when it is to his interest to do so. To permit him to do so would be a fraud on both courts and would permit the bankrupt to profit by his own wrong-doing and criminal acts. Having represented the facts in the bankruptcy court, the bankrupt should be forever estopped and barred to assert a contrary state of facts at any time or in any proceeding, except in a clear case of innocent mistake of fact, and no such claim, of course, is made here.

The Texas Supreme Court placed particular stress on the case of Johnson *v.* Collier, 222 U. S. 538, 32 Sup. Ct. 104, wherein this court held that, in the interim, between the date of the filing of a petition in bankruptcy and the appointment of a trustee, the bankrupt had sufficient title to maintain an action for the protection of the bankrupt's estate. That case involved no questions of fraud, false oaths and concealment of property from the trustee by the bankrupt, and we do not consider it a case touching the point in issue. We are quite willing to concede that a bankrupt has, under certain circumstances, sufficient title to maintain an action with respect to the property of the estate, especially to protect the estate.

The stumbling block of the Texas court seems to be the failure to appoint a trustee. Again we say the rule which forbids the maintenance of a suit of this character by a bankrupt, under the circumstances herein detailed, does not rest upon a technical inquiry into the question of just where the title to the bankrupt estate is vested in the absence of the appointment of a trustee. While there was no trustee in which the title of the bankrupt could vest, nevertheless, under the plain intention and purpose of the Bankruptcy Act, the title of the bankrupt was so far suspended that he could not, after deceiving the bankruptcy court and his creditors, claim an advantage growing out of that deception. To show that the title of the bankrupt is considered suspended immediately upon the filing of the petition, it is only necessary to bear in mind that it is consistently held that, whenever the trustee

is elected, his title dates back to the date of filing of the petition. Whatever title, therefore, the bankrupt has in the interim, to enable him to bring an action to protect the estate, it is necessarily a very qualified and limited title and right. Such title and right must be considered held and to be exercised only for the benefit of the estate, creditors, court, and trustee. It is no such right or title as will enable the bankrupt to maintain an action for his personal benefit to the damage and fraud of creditors and court or maintain such action partly for his personal benefit and partly for the benefit of a favored creditor.

In Acme Harvester Co. *v.* Beekman Lbr. Co., 222 U. S. 300, 32 S. Ct. 96, it is said:

> "The filing of the petition is a caveat to all the world and in effect an attachment and injunction. * * * The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court *is so far in rem that the estate is regarded as in custodia legis from the filing of the petition.* * * * There are many provisions of the law which show its purpose *to hold the property of the bankrupt intact from the filing of the petition,* in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings. * * * The filing of the petition asserts the jurisdiction of the Federal court, the issuing of its process brings the defendant into court, the selection of

> the trustee to follow upon the adjudication, and thereupon the estate belonging to the bankrupt, held by him or for him, vests in the trustee. *Pending proceedings, the law holds the property to abide the decision of the court* upon the question of adjudication *as effectively as if an attachment had been issued.*" (Italics ours.)

Petitioners allege that, notwithstanding no trustee was appointed, yet, upon the filing of the voluntary petition in bankruptcy by respondent, all of his assets, even though concealed, passed so far into the custody of the bankruptcy court for the benefit of his creditors that he cannot thereafter, after having been discharged from his obligations and debts, assert a title in such concealed assets for his own benefit and the benefit of favored creditors. His estate and all of his property was in *custodia legis* from the moment the petition was filed and the circumstance that no trustee was appointed to handle the assets under the directions of the bankruptcy court will not enable respondent to profit by his own wrongdoing. Notwithstanding no trustee was appointed he traded his assets for a complete discharge of his debts, just as effectively and as conclusively as though a trustee had been appointed. Having obtained that benefit (release from debt) he must be deemed to have lost the right and benefit to this asset which, under the scheme of the Bankruptcy Act, constitutes the *quid pro quo* for his release.

Petitioners further allege that, under the Federal statutes, as they existed in June, 1924, at the time the final judgment was rendered in this case in the trial

court, petitioners had an absolute right, inasmuch as this case involves a Federal question, to prosecute a writ of error in this Court as soon as they had exhausted their remedies in the State appellate courts. Being in doubt as to whether or not their right of review in this Court is now to be governed by the new judicial code they have sought to review the matter by this application for a writ of certiorari, but petitioners respectfully urge that they are entitled to have this Court review the matter because, under the law as it existed at the time judgment herein was rendered, a writ of error could be prosecuted in this Court. This is held in Acme Harvester Company case, *supra.*

Wherefore petitioners pray that this Court issue its writ of certiorari to the Court of Civil Appeals of the Fifth Supreme Judicial District of Texas at Dallas, Texas, and cause the record and proceedings in this cause to be brought before this Court that the errors committed may be corrected.

M. O. DANCIGER,
EMERICH OIL COMPANY,
Petitioners,

By I. J. RINGOLSKY,
WALLACE & TAYLOR,
CARDEN, STARLING, CARDEN & HEMPHILL,
CHARLES L. BLACK,
T. F. HUNTER,
RINGOLSKY, FRIEDMAN & BOATRIGHT,
Attorneys for Petitioners.

Certificate of Counsel.

I, I. J. Ringolsky, attorney, regularly admitted to practice in the United States Supreme Court, hereby certify that I am one of the attorneys for petitioners in the above entitled cause, and do further certify that I have carefully examined the record and opinion in this case, and from a consideration thereof and the facts and the law, I believe this petition is well taken and should be granted, and the judgment of the court below reversed, and that the facts stated in the foregoing petition are true according to my best knowledge and belief.

I. J. RINGOLSKY,
Attorney for Petitioners.

INDEX TO BRIEF.

	Page
Brief in support of petition for certiorari	1
(a)	1
(b)	3
(c)	5
(e)	6
(f)	10

TABLE OF CASES CITED.

Dushane v. Beall, 161 U. S., 513; 16 Sup. Ct., 637	8
First National Bank of Jacksboro v. Lasatar, 196 U. S., 115; 25 Sup. Ct., 206; 49 L. Ed., 409	1
Johnson v. Collier, 222 U. S., 538; 32 Sup. Ct., 104	10
Juden v. Nebham, 60 S., 45	6
Rand v. Iowa Central Ry. Co., 96 App. Div., 413; 89 N. Y. S., 212; reversed, 186 N. Y., 58	3
Rand v. Sage, 94 Minn., 344; 102 N. W., 864	5
Scruby v. Norman, 91 Mo. App., 517	6

STATUTES CITED.

Vernon's Annotated Texas Statutes, Revision 1925, Article 6636 (Acts 1889, page 103; G. L., Vol. 9, page 1031)	10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1060.

M. O. DANCIGER AND EMERICH OIL COMPANY,
PETITIONERS,

vs.

N. K. SMITH, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

(*a*)

We have already cited and quoted from the case of First National Bank of Jacksboro *v.* Lasatar, 196 U. S. 115, 25 Sup. Ct. 206, 49 L. Ed. 409. In our opinion, the reasoning back of that decision applies with unanswerable force to this case. The fact that there was a trustee in that case and no trustee in this case seems to us immaterial when the real basis for the decision is considered, viz, that a bankrupt cannot, by

concealing his assets, obtain any benefit for himself, which any court, either State or Federal, will assist him to recover.

The whole purpose and theory of the National Bankruptcy Act is opposed to a situation arising whereby a bankrupt can conceal his assets and profit by the concealment. Reduced to its final analysis, that is what this case involves and nothing more. Respondent tried to make it appear that he was merely acting for the benefit of his two favored creditors, but it is entirely clear from his own testimony that at least part of the judgment which he was seeking to and did recover against petitioners was for his own benefit. Both the Court of Appeals and the Supreme Court of Texas decided the case upon the theory that some equity, at least, remained in respondent, notwithstanding the assignments. It must be borne in mind that the assignments were nothing more or less than collateral security and were not absolute assignments in the sense that respondent had disposed of the claim. Even if the amount recovered did not exceed the amount respondent owed these two favored creditors, still respondent retained such an interest in the claim, inasmuch as the assignments were only by way of security, that respondent ought not to be permitted to maintain the action in his own name, under the circumstances existing in this case. So far as this record shows, the value of this claim plus the value of the patented wrench and the value of the respondent's claim against Y. O. McAdams, all mentioned in the two letters, may

have, in the aggregate, been worth many times the total indebtedness due Hutchinson and Cranfill.

(*b*)

In Rand v. Iowa Central Ry. Co., 96 App. Div. 413, 89 N. Y. S. 212, action was brought to recover for personal services and defendant interposed the defense that, prior to the commencement of the suit, plaintiff had been adjudicated a bankrupt. It was shown that plaintiff did not schedule this chose in action or any other property and, consequently, *no trustee* in bankruptcy was appointed. The court says:

> "The plaintiff contends that the title and right to maintain the action remained in him until the appointment of a trustee in bankruptcy, and, since one was not appointed, his title and right have not been divested. This contention on the part of the plaintiff seems so extraordinary and fraught with consequences so disastrous to the rights of creditors, that a court should hesitate to so declare the law, unless there is no avenue of escape. At first blush it would seem that the plaintiff not only perpetrated a fraud upon the bankruptcy court, but, having by the bankruptcy proceedings lulled his creditors into acquiescence, now claims the right to recover upon this claim upon the theory that the adjudication in bankruptcy discharges him from all liability to his creditors. It should be stated, however, that the testimony of the plaintiff in his own behalf tends to show that this claim was not fraudulently concealed, but that it was omitted in good

faith by advice of counsel. However, that may be in this particular case, it is manifest that, if the court decides that the plaintiff may maintain this action, fraudulent bankruptcy proceedings will be multiplied manifold, and causes of action will be concealed with a view to being prosecuted by the bankrupt in his own right, after obtaining his discharge.

* * * * * * *

"I think it is the fair intent and true construction of the bankruptcy act and rules, that, if no trustee be appointed, because assets are not shown, yet a trustee may and should be appointed upon the discovery of assets. It may be that the legal title to this chose in action remained in the bankrupt, but it is clear, I think, that *he holds it as a trustee, and that the equitable title passed to the creditors and the custody and control passed to the court for their benefit,* to be administered through a trustee, to whom the legal title will pass on his appointment, and that, therefore, the plaintiff is not the real party in interest and cannot maintain this action."

Notwithstanding the above case was reversed by the New York Court of Appeals (see 186 N. Y. 58), we are convinced the above reasoning and decision cannot be successfully assailed without opening up a wide road for fraud by bankrupts on the courts and their creditors. The New York Court of Appeals reversed the case on very much the same theory as the Texas courts have decided this case, viz, on a narrow consideration of whether or not legal title passed where no trustee was appointed.

(*c*)

In Rand *v.* Sage, 94 Minn. 344, 102 N. W. 864, plaintiff, after bankruptcy, sought to recover certain assets. No trustee had been appointed and these assets not disclosed and the Supreme Court of Minnesota held plaintiff could not recover, saying in part:

> "While the full legal title and control of the property does not pass to the trustee until one is appointed and qualified, yet if the creditors do not for any reason act within the time limited, the power is expressly conferred upon the court to appoint such trustee, and if necessary in the meantime to take possession of the property and exercise dominion and control over it for the benefit of the creditors through the medium of a receiver specially appointed or the marshal of the court. These powers would not have been granted if it had been the intention to deprive the court of dominion over or jurisdiction of the estate pending the time a trustee might be appointed. Title remaining in the bankrupt is inconsistent with control of the estate by the court. There must be either one thing or the other. The bankrupt retains title to his property with power to exercise dominion over it, to transfer and encumber it, or the title passes unconditionally to the court for the benefit of the creditors, until a trustee is appointed or the estate is closed. The latter is the only rational view consistent with the provisions of the Act.
>
> "Conceding that title passed, and the property of the bankrupt remained suspended or vested in the court for the benefit of the creditors, another question arises, etc."

In Juden *v.* Nebham, 60 S. 45, the Supreme Court of Mississippi had this identical question before it and held plaintiff could not recover where he had gone into bankruptcy, concealed the assets and caused a trustee not to be appointed, saying in part:

> "If appellants owed appellee any amount when he filed his petition in bankruptcy, then it was appellee's duty to report and schedule that amount and surrender any benefit therefrom as a part of his estate. He cannot take advantage of any failure to do this."

(*e*)

The foregoing three cases are eloquent statements of the reasons why the result reached by the Texas courts must be deemed erroneous and out of line with the general intent and purpose of the law and particularly of the bankruptcy act.

In Scruby *v.* Norman, 91 Mo. App. 517, plaintiff sought to recover on a note and defendant set up the fact of plaintiff's bankruptcy. A trustee was appointed in that case, but the language used by the court is such that it leaves no doubt that the result would be the same without regard to whether a trustee was appointed. The court says in part:

> "Will the fact that the said debt is not enumerated or referred to anywhere in the proceeding in bankruptcy as a part of the assets of the bankrupt's estate, or that the trustee took no steps to reduce it to possession, nor to have him-

self substituted as plaintiff in this suit, have the effect, after his discharge, and that of the plaintiff as a bankrupt, to revest in the latter, the interest that was divested by the bankrupt proceedings? That such would be the effect is inconceivable. The record in the bankruptcy proceedings show that the plaintiff, at the time of the adjudication, was largely indebted. It further shows that no assets of his estate were scheduled or came into the hands of the trustee, so that his creditors were paid nothing on their claims. And can it be that his right to sue for the recovery of the debt, which existed at the time of the adjudication, but of the ownership of which he was deprived by that adjudication, may be restored by the discharge of the trustee and the bankrupt? Can it be that in a case where a bankrupt has not enumerated in his schedule or surrendered a chose in action due to him at the time of the filing of his petition in bankruptcy, or when by fraud and perjury he is enabled to withhold such chose from the administration of his estate by the trustee, that his title and interest in such chose survives in him and the bankruptcy proceeding and can be asserted by him in a judicated proceeding after his discharge in bankruptcy; or, if such title and interest does not survive the adjudication, is it *ipso facto* revived by the discharge? To answer these queries in the affirmative would be to invite the commission of the gravest fraud and perjury, which it is safe to assume was never intended by the bankrupt law."

It will be observed that the court in the above case takes the broad view that the title was divested out

of the bankrupt by the adjudication. We think this is the only sound conclusion that can be reached.

This is in line with the holding of this Court in Dushane *v.* Beall, 161 U. S. 513, 16 Sup. Ct. 637. In that case it is held that a bankrupt cannot, after his discharge, sue and recover on a claim which it is not shown was abandoned by the assignee or trustee in bankruptcy. In that case the evidence tended to show that the assignee in bankruptcy knew nothing about the claim and the same was not, in any way, mentioned in the bankruptcy proceedings, and this Court held that the bankrupt could not sue and recover in his own name for his own benefit on account of such claim, notwithstanding the assignee in bankruptcy failed, for a number of years, to prosecute the claim. In other words, before a bankrupt can invoke the aid of a court to assist him in recovering property or rights which properly belong to his estate as a bankrupt, he is bound to show that there has been an abandonment of such property or rights by the trustee in bankruptcy, and that it is only by virtue of such abandonment that the bankrupt is deemed revested with any such right or title as will enable him to recover.

The same rule ought to prevail in a case where no trustee was appointed, and the bankrupt should be required to show an abandonment of the particular property or rights before he is allowed to recover and where, as here, it appears that no trustee was appointed, then no abandonment can be shown.

In the petition we have already drawn attention to the long-settled rule established by numerous decisions of this Court and of all the Federal courts that, from the moment of the filing of a petition in bankruptcy, all the property of the bankrupt of every kind and nature is deemed to be in *custodia legis*. From that moment forward the bankrupt is deprived of the custody and control of his property and his property becomes an estate to be administered by the bankruptcy court for the benefit of all the creditors. The election or appointment of a trustee is merely the providing of an agent of the bankruptcy court to actively gather the estate into actual possession and to handle and dispose of the estate under the direction and supervision of the bankruptcy court.

None of the cases hold that the custody, control and title of the bankrupt remains in the bankrupt until the appointment or election of the trustee, but, on the contrary, all the cases hold that the property is in the custody of court from the time of the filing of the petition, and that, when the trustee is finally elected, whether in a short time or many years, that the title of the trustee does not date from the appointment of the trustee but dates from the time of the filing of the petition in bankruptcy. We, therefore, say that the bankrupt does not have such title, right and interest in the property belonging to the estate in the interim between the filing of the petition in bankruptcy and the appointment of the trustee as will enable the bankrupt to prosecute and maintain an action in any court seeking to recover assets belonging to the bankrupt estate for the benefit of the bankrupt or for the

benefit of the bankrupt and a favored creditor and in fraud of the creditors and bankruptcy court. As is pointed out in the New York case, *supra,* whatever right or title the bankrupt may have in the estate between the filing of the petition and the appointment of a trustee in bankruptcy must be deemed to be as a trustee. Undoubtedly it is upon this theory that this Court, in the case of Johnson *v.* Collier, *supra,* held that, during such interim, the bankrupt may maintain an action for the protection of the property of the estate. That is a very different thing than maintaining an action for his own benefit and in opposition to and in conflict with the interests of the bankruptcy court and of the creditors of the estate. There is a vast and fundamental difference.

All the principles of estoppel and *res adjudicata* are opposed to permitting a bankrupt to do what respondent has been permitted to do in this case. This Court needs no citation of authority for the often-announced proposition that men cannot go into court and, upon their solemn oath, invoke the jurisdiction of a court, representing the facts in a certain manner, and then, when it is to their own private and personal interest, repudiate their former actions. Courts do not allow themselves to be made the instruments of fraud and aids to the perpetration of fraud and deception by litigants.

(*f*)

Article 6636, Vernon's Annotated Texas Statutes, Revision 1925 (Acts 1889, page 103; G. L. Vol. 9, page 1031), is in full as follows:

"The sale of a judgment, or any part thereof, of any court of record, or the sale of any cause of action, or interest therein, after suit has been filed thereon, shall be evidenced by a written transfer; which, when acknowledged in the manner and form required by law for the acknowledgment of deeds, may be filed with the papers of such suit, and when thus filed the clerk shall make a minute of said transfer on the margin of the minute book of the court when such judgment of said court is recorded; or if judgment be not rendered when transfer is filed, the clerk shall make a minute of such transfer on the court trial docket where the suit is entered, giving briefly the substance thereof; for which service he shall be entitled to a fee of 25 cents, to be paid by the party applying therefor; and this article shall apply to any and all judgments, suits, claims and causes of action, whether assignable in law and equity or not. When said transfer is duly acknowledged, filed and noted as aforesaid, the same shall be full notice and valid and binding upon all persons subsequently dealing with refence to said cause of action or judgment, whether they have actual knowledge of such transfer or not."

While possibly non-compliance with the above statute does not make an assignment of a chose in action, after suit brought, void as between the parties, nevertheless no attempt was made to comply with this section, and is a circumstance tending very strongly to show that respondent and Cranfill and Hutchinson desired the record to remain in such condition as to

enable respondent to collect on this judgment in his own name and, so far as the record shows, entirely for his own account.

Non-compliance with this section in this case also tends very strongly to show that there never was any assignment to Cranfill and Hutchinson, especially when coupled with the fact that there is no evidence or testimony in the record showing that Cranfill or Hutchinson ever accepted the assignment, and where they did not, in any way, appear in the case, either as parties or as witnesses, and no counsel appeared representing them. However the fact may be as to the actual existence of these alleged assignments, nevertheless, under respondent's own testimony, it was conclusively shown that he had a very material interest in the judgment himself and had an interest in the claims assigned inasmuch as the assignments were by way of collateral security only.

Respectfully submitted,

I. J. RINGOLSKY,
WALLACE & TAYLOR,
CARDEN, STARLING, CARDEN & HEMPHILL,
CHARLES L. BLACK,
T. F. HUNTER,
RINGOLSKY, FRIEDMAN & BOATRIGHT,
Attorneys for Petitioners.